# No. 14,190

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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SUPERIOR SAND AND GRAVEL MINING CO., INC., a corporation,

*Appellant,*

vs.

TERRITORY OF ALASKA,

*Appellee,*

and

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR., LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON and GRACE D. SAXTON, Co-Partners Doing Business as the Northern Construction Association, and ELLSWORTH E. SAXTON, as Agent for Said Association,

*Appellants,*

vs.

TERRITORY OF ALASKA,

*Appellee.*

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**Upon Appeal from the District Court for the Territory of Alaska, Third Division.**

# REPLY BRIEF OF APPELLANTS SCHUBERT, ET AL., DOING BUSINESS AS THE NORTHERN CONSTRUCTION ASSOCIATION, AND ELLSWORTH E. SAXTON, AS AGENT FOR SAID ASSOCIATION.

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A detailed analysis of the briefs of the two appellants and the brief of appellee, discloses only four

points of controversy. Appellants contend that the following four statements are correct and that therefore the decision of the lower Court should be reversed. The appellee, Territory of Alaska, contends that the statements are not correct.

1. Sand and gravel are minerals, subject to placer location under the mining laws of the United States.

2. The determination of the mineral character of the land here involved is solely for the determination of the Land Department of the United States, and not for the Court in this proceeding.

3. The Materials Act did not remove the lands here involved from the operation of the mining laws of the United States.

4. The failure of the Secretary of the Interior to make rules and regulations under the Act of August 7, 1939, 53 Stat. 1243, does not invalidate the placer mining locations of appellants.

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**1. SAND AND GRAVEL ARE MINERALS, SUBJECT TO PLACER LOCATION UNDER THE MINING LAWS OF THE UNITED STATES.**

The Territory of Alaska admits at page 3 of its brief that the placer mining claims of the appellants are valuable deposits of sand and gravel.

But the Territory states it was not the intent of Congress to include sand and gravel within the scope

of the word "mineral", that sand and gravel are not recognized as minerals by standard authorities on the subject, and that sand and gravel do not meet the dictionary definition of "mineral" in that they are a heterogenous mixture without a definite chemical composition. The Territory bases its reasoning upon *Zimmerman v. Brunson* (1910), 39 L.D. 310 and *U. S. v. Aitkin, et al.* (1913), 25 Phil. 7. The Territory rejects as unsound the later cases, holding that sand and gravel are minerals under the mining laws: *Loney v. Scott* (1910), Oregon, 112 P. 172; *Layman v. Ellis* (1929), 52 L.D. 714, overruling *Zimmerman v. Brunson; Opinion of the Acting Solicitor* (1933), 54 L.D. 294, and *U.S. v. Barngrover* (1942), 57 L.D. 533. These cases authoritatively answer the contentions of the Territory in every particular. It must be remembered that in 1872, when the mining laws were passed, sand and gravel may not have been valuable minerals such that the property containing them would be more valuable for its minerals than for its agricultural potential. Even in 1910, when the Land Department first held on the subject, the value of sand and gravel generally had not yet been realized. However, by 1929, when the Land Department finally held that sand and gravel were minerals, the really great potential of sand and gravel in trade and commerce was finally being realized. To logically follow the contention of the Territory that Congress did not intend to include sand and gravel as minerals, it would be necessary to conclude that radium and uranium are not minerals because, if they were known at all in

1872, they were known only to the experimental chemist and had no value in trade and commerce. It is entirely more logical to presume that the mining laws were passed as general law establishing a standard to be applied to changing conditions over a long span of years and were not intended to limit the mining laws to then existing chemical, physical and economic interpretations.

Each deposit of sand and gravel has a definite chemical composition, but each deposit varies in some particular from every other deposit. Sand and gravel are no more heterogeneous than coal and oil, both of which are minerals.

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2. **THE DETERMINATION OF THE MINERAL CHARACTER OF THE LAND HERE INVOLVED IS SOLELY FOR THE DETERMINATION OF THE LAND DEPARTMENT OF THE UNITED STATES, AND NOT FOR THE COURT IN THIS PROCEEDING.**

The Territory has attempted to make the determination of whether or not valuable deposits of sand and gravel are "mineral" a matter of law to be decided by the Court, apparently under the assumption that the Courts must decide in the first instance whether a substance is "mineral" and that the Land Department is limited to a decision as to whether or not a particular deposit of that "mineral" is of sufficient quantity and quality to render the land containing the deposit open to occupancy and purchase under the mining laws.

Although the mining laws have been in effect since 1872, there is no reported decision supporting the contentions of the Territory. All reported decisions are to the effect that, except in cases of fraud, the determination of the Land Department as to the mineral or non-mineral character of lands is final and conclusive on the Courts. The Supreme Court terms the Land Department a "legislative court" (*Crowell v. Benson,* 285 U.S. 22, 50), and Congress has not given the judicial department either concurrent or appellate jurisdiction over that "legislative court".

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### 3. THE MATERIALS ACT DID NOT REMOVE THE LANDS HERE INVOLVED FROM THE OPERATION OF THE MINING LAWS OF THE UNITED STATES.

Neither the express language of the Materials Act, nor the legislative history of this statute lend any support to appellee's contention that by this passage Congress evinced an intent that sand and gravel be not subject to mineral claims. On the contrary, as was shown in appellants' brief, at pages 16-19 (see also Appellants' Appendix, at pages 10-32), the Materials Act both by express proviso and other legislative acquiescence in contemporaneous administrative construction, clearly evinced a Congressional intent to treat sand and gravel in the same manner as any other minerals. Thus, this substance would be subject to disposition under the Materials Act, in those cases where because of its marginal character and lack of

value it could not be successfully claimed for mining purposes.

This view is confirmed not only by the statutory language, the legislative history and the decisions cited in appellants' brief, but also by the most recent regulations of the Department of Interior contained in Title 43, Code of Federal Regulations, Section 259, as amended by Circular 1758 (15 F.R. 4081, June 24, 1950). Subsection 259.1 summarizes the general authority for the disposal of material, including sand, stone and gravel. Subsection 259.3 is entitled "Disposals which must be made under other statutes; rights under other statutes".

Paragraph (d) reads as follows:

"Sand, stone and gravel of such quality and quantity as to be subject to the mining law will not be disposed of under the Materials Act."

The long line of decisions cited in appellants' brief (at pages 5-14) has firmly established what constitutes sand and gravel or any other mineral "of such quality and quantity as to be subject to the mining law" as that which when found any place makes the land more valuable for mining than for agriculture and which, when present in such quality and quantity as to justify a reasonably prudent man in making the expenditures necessary to commercial mining operations, will support a claim for a mineral patent to the land. Neither the Courts nor the Land Department have departed, either before or after the enactment of the Materials Act, from this old established rule.

4. THE FAILURE OF THE SECRETARY OF THE INTERIOR TO MAKE RULES AND REGULATIONS UNDER THE ACT OF AUGUST 7, 1939, 53 STAT. 1243, DOES NOT INVALIDATE THE PLACER MINING LOCATIONS OF APPELLANTS.

The pertinent portion of the Act of August 7, 1939, 53 Stat. 1243, is the last sentence:

> "The Secretary of the Interior is hereby authorized to make all necessary rules and regulations in harmony with the provisions and purposes of this Act for the purpose of carrying the same into effect."

The Secretary of the Interior did not make any rules and regulations; and, specifically, did not make any rules or regulations relating to compensation to Territorial lessees for damage to crops or improvements by the mineral claimant.

While appellants recognize that a mineral occupant might cause damage to a surface lessee in some locations, under some circumstances, there is no contention here that any damage has been or will be caused to the surface lessees of the acreage here involved. The record (R. 53) shows that the Alaska Road Commission and a private corporation removed gravel from the land with the permission of the Territory and the lessee. Therefore, it is not shown that any rules and regulations were necessary.

No objection has been heard from any of the lessees involved.

The truth of the matter is that the enormous quantities of gravel available on the lands in question, and the limited surface use by Territorial lessees, obviate

any possibility of interference with the use of the surface by the lessees during the limited term of the leases.

Dated, Anchorage, Alaska,
September 20, 1954.

Respectfully submitted,
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